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9 Attorneys for Defendant
10 United States of America

11 UNITED STATES DISTRICT COURT
12 FOR THE CENTRAL DISTRICT OF CALIFORNIA
13 WESTERN DIVISION

14 DONOVAN J. FOSTER,

15 Plaintiff,

16 v.

17 UNITED STATES OF AMERICA,

18 Defendant.

No. 2:22-cv-08522-FWS-PVC

**DEFENDANT'S *EX PARTE*
APPLICATION TO STRIKE
PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS
OR, IN THE ALTERNATIVE,
CONTINUE DEFENDANT'S REPLY
DEADLINE AND THE MOTION TO
DISMISS HEARING**

Honorable Fred W. Slaughter
United States District Judge

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23 **EX PARTE APPLICATION**

24 Pursuant to Local Rule 7-19, Defendant United States of America, apply *ex parte*
25 to strike Plaintiff's opposition (Dkt. No. 44) to Defendant's Motion to Dismiss (the
26 "Motion") (Dkt. No. 43) or, in the alternative, to continuance Defendant's reply deadline
27 the Motion's hearing date. Defendant requests that Plaintiff's opposition be stricken as it
28 was filed eight days late in violation of Local Rule 7-9. This is now the second Motion to

Dismiss opposition that has been untimely filed by Plaintiff (*see* Dkt. No. 16). Alternatively, Defendant requests that the Court continue Defendant's reply deadline and the Motion's hearing date. *See* attached Declaration of Jonathan Russell Blakey ("Blakey Decl."), ¶ 8. Defendant proposes a continuance as follows:

Event	Current Date	Proposed Date
Defendant's Reply Deadline	August 3, 2023	August 16, 2023
Hearing	August 17, 2023, at 10 a.m.	September 14, 2023, at 10 a.m. ¹

This is the first request for a continuance of these deadlines.

Urgency: This order is sought by means of an *ex parte* application because there is insufficient time to file a motion to strike or seek a continuance of the deadlines by noticed motion before the current August 17, 2023 hearing date.

Notice: On August 7, 2023, the undersigned counsel corresponded with Plaintiff's counsel, Veronica Aguilar, via email, regarding Plaintiff's late opposition filing and informed her that in the event she does not present defense counsel with a joint stipulation to continue the reply deadline and hearing date, Defendant would be forced to file an *ex parte* application seeking additional time for a reply. Blakey Decl., ¶¶ 5 and 6. Plaintiff's counsel failed to present defense counsel with a proposed stipulation. *Id.*, ¶ 6. On August 9, 2023, defense counsel informed Plaintiff's counsel, via e-mail and voicemail, that Defendant intended to file this *ex parte* application. *Id.*, ¶¶ 6-8.

Plaintiff's Counsel Contact Information: Pursuant to Local Rule 7-19, Plaintiff's counsel's contact information is as follows:

Veronica Aguilar

The Law Office of Veronica M. Aguilar

¹ Defendant's proposed hearing date is based on the next available motion date listed on Judge Slaughter's website.

1 16870 West Bernardo Drive, Suite 400

2 San Diego, California 92127

3 Telephone: (858) 674-6945

4 E-mail: veronica@vaguilar.com

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6 Dated: August 11, 2023

Respectfully submitted,

E. MARTIN ESTRADA

United States Attorney

DAVID M. HARRIS

Assistant United States Attorney

Chief, Civil Division

JOANNE S. OSINOFF

Assistant United States Attorney

Chief, Complex and Defensive Litigation
Section

12 /s/ Jonathan Russell Blakey

13 JONATHAN RUSSELL BLAKEY

Assistant United States Attorney

14 Attorneys for Defendant

United States of America

MEMORANDUM OF POINTS AND AUTHORITIES

Defendant applies *ex parte* to strike Plaintiff's late filed opposition to Defendant's Motion to Dismiss (the "Motion") or, in the alternative, continue Defendant's deadline to file a reply and the Motion's hearing date. The request is based on the following reasons:

Defendants filed their Motion to Dismiss Plaintiff's First Amended Complaint ("FAC") on July 17, 2023. Dkt. 43. Pursuant to the Central District of California's Local Rules and the Court's Procedures, Defendant noticed the Motion for hearing on August 17, 2023. Blakey Decl. ¶ 2; Dkt. 43. Pursuant to Local Rule 7-9, Plaintiff's opposition was therefore due on July 27, 2023, and Defendant's reply was due on August 3, 2023. Blakey Decl. ¶¶ 3 and 4; *see also* Local Rules 7-9, 7-10

On August 4, 2023, Plaintiff filed his opposition to Defendant's Motion, eight days late. Dkt. 44. Pursuant to Local Rule 7-12, "[t]he Court may decline to consider any memorandum or other document not filed within the deadline set by order or local rule." L.R. 7-12. Here, Plaintiff not only filed his opposition more one week late, but his opposition was also filed without leave of Court **after Defendant's reply deadline had pass as well**. This is not the first time Plaintiff has failed to file a timely an opposition. *See* Dkt. No. 16 (Defendant's Notice of Non-Receipt regarding Plaintiff's opposition to Defendant's initial motion). Accordingly, it is appropriate for the Court to strike Plaintiff's untimely opposition and grant Defendant's Motion if it so chooses. *See Pham v. Talkdesk, Inc.*, No. 2:22-cv-05325, 2023 WL 2558554 (C.D. Cal. Jan. 11, 2023) ("Plaintiff's failure to timely respond to Defendant's motion operates as his consent to the granting of the motion, and the Court may grant Defendant's **motion to dismiss** on this basis."); *see also Whitten v. Screen Actors Guild*, No. 2:19-cv-05818, 2019 U.S. Dist. LEXIS 185223, at *2 (granting the defendants' motion to dismiss for failure to file a timely opposition).

In the alternative, Defendant requests that the Court continue Defendant's reply deadline and the hearing on the Motion. Under Federal Rule of Civil Procedure 6(b)(1)(A), the Court may extend the dates for good cause. Good cause supports this application because Plaintiff filed his opposition on August 4, 2023, eight days late and after

1 Defendant's reply deadline had passed, all without leave of Court. This Court's Local
2 Rules provide that:

3 [e]ach opposing party shall . . . file with the Clerk . . . (a) the evidence upon
4 which the opposing party will rely in opposition to the motion and a brief but
5 complete memorandum which shall contain a statement of all the reasons in
6 opposition thereto and the points and authorities upon which the opposing
7 party will rely, or (b) a written statement that that party will not oppose the
8 motion.

9 L.R. 7-9 (emphasis added). The language of the Rule is unequivocal; it is not discretionary.
10 Unlike a reply brief, *see* L.R. 7-10, parties must file an opposition or notify the Court of
11 their non-opposition within the time constraints.

12 Plaintiff's late opposition filing not only violates Local Rule 7-9, but has also
13 precluded Defendant from having sufficient time to prepare and file its reply brief by the
14 August 3, 2023 deadline. Defense counsel attempted to work with Plaintiff's counsel and
15 agreed, upon Plaintiff's counsel's request, to file a joint stipulation continuing the reply
16 deadline and Motion hearing date, but Plaintiff's counsel never presented a proposed
17 stipulation to defense counsel despite promising to do so on August 7, 2023. Blakey Decl.,
18 ¶¶ 5-7.

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1 For all the above reasons, Defendant respectfully requests that the Court strike the
2 Plaintiff's opposition, or in the alternative, continue Defendant's reply deadline and the
3 hearing on the Motion.

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5 Dated: August 11, 2023

Respectfully submitted,

E. MARTIN ESTRADA
United States Attorney
DAVID M. HARRIS
Assistant United States Attorney
Chief, Civil Division
JOANNE S. OSINOFF
Assistant United States Attorney
Chief, Complex and Defensive Litigation
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11 /s/ Jonathan Russell Blakey
JONATHAN RUSSELL BLAKEY
Assistant United States Attorney

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13 Attorneys for Defendant
United States of America
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DECLARATION OF JONATHAN RUSSELL BLAKEY

I, Jonathan Russell Blakey, do hereby declare and state as follows:

1. I am an Assistant United States Attorney for the Central District of California. I am assigned to the defense of this action. I make this Declaration based on my personal knowledge of the facts and circumstances set forth herein, as well as my review of the official files of the United States Attorney's Office for the Central District of California.

2. On July 17, 2023, I filed a Motion to Dismiss ("Motion") on behalf of Defendant United States of America in response to Plaintiff Donovan J. Foster's First Amended Complaint. Dkt. 29 and 43. Pursuant to and in compliance with the Local Rules, I set the Motion for hearing on August 17, 2023. Dkt. 43.

3. Pursuant to Local Rule 7-9, Plaintiff's opposition was due July 27, 2023.

4. On Friday, August 4, 2023, Plaintiff filed his opposition, eight days late and after Defendant's reply deadline had passed (August 3, 2023) pursuant to Local Rule 7-10.

5. I immediately emailed Plaintiff's counsel, Veronica Aguilar and informed her that because the opposition was filed late, seeking leave of court was necessary and that continuing the reply deadline and the Motion hearing date would also be necessary. Because the opposition was filed after Defendant's reply deadline, and because I had several other matters scheduled for the week of August 7th, I needed additional time to assess Plaintiff's opposition and prepare a reply.

6. In response, Ms. Aguilar requested that Defendant agree to a joint stipulation to continue Defendant's reply deadline and the hearing date. I agreed and asked that Ms. Aguilar send me a draft stipulation by the close of business on August 7, 2023. I did not receive a stipulation from Ms. Aguilar.

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7. On August 9, 2023, I informed Ms. Aguilar, via e-mail and voicemail, that Defendant would file an *ex parte* motion to strike Plaintiff's opposition or, in the alternative, continue Defendant's reply deadline and the Motion hearing date. Ms. Aguilar has not responded.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 11, 2023, at Los Angeles, California.

/s/ Jonathan Russell Blakey
JONATHAN RUSSELL BLAKEY